

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
)	Billed Entity No. 227729
)	
JUVENILE COURT AND COMMUNITY)	Form 471 No. 506040
SCHOOLS, SANTA BARBARA, CA)	
)	
Schools and Libraries Universal Service)	CC Docket 96-45
Support Mechanism)	CC Docket 02-6
)	

**APPEAL AND REQUEST FOR REVIEW OF THE DECISION OF THE UNIVERSAL SERVICE
ADMINISTRATOR BY
JUVENILE COURT AND COMMUNITY SCHOOLS, SANTA BARBARA, CA**

I. INTRODUCTION

1. The Juvenile Court and Community Schools, (the “District”) appeals the decision of the Universal Service Administrative Company (“USAC”) concerning the schools and libraries universal service support mechanism (also known as the E-rate program) denial of funding due to USAC’s decision that the District’s proposed internet access was not cost effective.
2. Under USAC rules, the reviewer cannot accept any new information on appeal which the District had not originally submitted. The District believes that special circumstances exist to justify a waiver of the Commission’s rules, and, accordingly files this Request for Review of the administrative rules applied to this case.
3. The District requests that the Commission review the decision of USAC denying funding

on a Form 471 application because USAC failed to understand or recognize extraordinary factors concerning request for services and thus decided the District had not shown that their request was cost effective.

II. BACKGROUND

1. Juvenile Court and Community Schools (“District”) is a division of the Santa Barbara County Education Office (SBCEO), which is an ESA as defined by USAC. The District operates nine (9) schools in a geographic area covering a 70 mile radius. The District has an “unduplicated” student enrollment of 2100 with a “snapshot” enrollment of 650. Because many of their students are wards of the court, they attend District schools from two days to several months. As a result, the District provides a completely individualized instructional program which will rely heavily on internet access.

2. According to the USAC, a potential conflict may arise when an ESA is a service provider and also an applicant, a consultant to school districts, or a Technology Plan approver. The potential conflict is that the selection of the service provider may not be fair and open but may, in fact, provide an unfair advantage to the ESA as service provider. The potential conflict may be resolved if:

The ESA is large enough to provide organizational and functional separation between staff acting as service providers and staff providing technology plan support and application and administration assistance. However, the ESA must be prepared to clearly show the separation of functions to USAC with appropriate documentation. Examples of such documentation include organizational flow charts, budgetary codes, and supervisory administration.

Even if state procurement rules permit public school districts to select an ESA's services on a non-competitive basis, FCC rules require that applicants for services must use competitive bidding for eligible services. The FCC competitive bidding requirements must be met to be eligible for discounts. These requirements include:

- Posting on USAC's website a *Description of Services Requested and Certification Form* (FCC Form 470)

- Fair and open consideration of all resulting proposals, whether in response to a Request for Proposal (RFP) or to an FCC Form 470, and
- Selecting the most cost-effective bid with price being the primary factor.

In this case, the SBCOE is an ESA and they are the Internet Service Provider for the District. The District posted the Form 470 on the USAC website, as required, and only received one bid. That bid was from the SBCOE and was accepted by the District.

According to USAC,

“the potential conflict of interest may be resolved if the ESA is large enough to provide organizational and functional separation between staff acting as service providers and staff providing technology plan support and application and administration assistance. However, the ESA must be prepared to clearly show the separation of functions to USAC with appropriate documentation. Examples of such documentation include organizational flow charts, budgetary codes, and supervisory administration.”

The Santa Barbara County Education Office (ESA) is a large organization with a separation of staffs providing technology plan support and those acting as service providers. A copy of their Organization Chart is attached. The Organization Chart clearly shows the separation between the ISP staff (computer center), Technology Plan approval and support staff (Coordinator of Educational Technology) and the Juvenile Court and Community Schools (the District). The Administrator in Charge of the Juvenile Court and Community Schools is Fred Razo who reports to the Assistant Superintendent, Categorical and Special Programs; the person who approves technology plans is the Coordinator of Education Technology who reports to the Assistant Superintendent, Instructional Services; and the Service Provider is the Computer Center whose Administrator reports to the Assistant Superintendent, Administrative Services. (See Attachment 1)

3. The District completed and filed an E-rate application Form 471 with USAC for the 2006-2007 funding year. During the PIA process, USAC sent the District a High Unit Cost

Review Request. The District was asked to provide “justification as to the cost effectiveness of requesting T1 Frame Relay service for 9 sites twice.” They answered that one was for internet access and one was for internet service. They did not provide further justification as this explanation appeared to answer USAC’s issues. There was no further contact with the District from the High Unit Cost Reviewer.

The District was notified that USAC had denied funding to the District saying that this was a result of a “cost effectiveness review, which has determined that your request for internet access has not been justified as cost effective as required by FCC rules”. The District promptly appealed to USAC. A review of the USAC web site did not provide the District with a definition of “cost-effectiveness”. The District felt there was a misunderstanding as to USACs belief that the District was requesting the same service “twice” and so the District explained that one group of FRNs was for circuits and one was for Internet Service. It was not a duplication. USAC answered that in the District’s appeal, they had failed to show USAC had erred in its denial and therefore the appeal was denied. In its denial letter USAC stated that “it has been determined that funding requests for Juvenile Court and Community Schools for internet access and internet services have not been justified as cost effective as required by the Schools and Libraries Support Mechanism's rules and procedures. Based on the documentation provided by Fred Razo during review, it was determined that the internet access cost per student ranging between \$208.09 to \$1,013.05 has been found not to be cost effective.” That was the first time the issue of “cost per student” was raised by USAC and the District did not have an opportunity to address that concern.

III. DECISIONS BY THE COMMISSION ON APPEALS

1. As noted in the decision published in the *Bishop Perry Middle School, New Orleans, LA* appeal, SLD # 487170, the “Commission may waive any provision of its rules on its own motion and for good cause shown.” (47 C.F.R. §1.3.) Additionally, a “rule may be waived where the particular facts make strict compliance inconsistent with the public interest.” *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

2. In *Bishop Perry Middle School, New Orleans, LA*, the Commission stated as follows:

“As we recently noted, many E-rate program beneficiaries, particularly small entities, contend that the application process is complicated, resulting in a significant number of applications for E-rate support being denied for ministerial, clerical or procedural errors. We find that the actions we take here to provide relief from these types of errors in the application process will promote the statutory requirements of section 254(h) of the Communications Act of 1934, as amended (the Act), by helping to ensure that eligible schools and libraries actually obtain access to discounted telecommunications and information services. In particular, we believe that by directing USAC to modify certain application processing procedures and granting a limited waiver of our application filing rules, we will provide for a more effective application processing system that will ensure eligible schools and libraries will be able to realize the intended benefits of the E-rate program as we consider additional steps to reform and improve the E-rate program. The Commission may waive any provision of its rules on its own motion and for good cause shown. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.

As of the effective date of this Order, we require USAC to provide all E-rate applicants with an opportunity to cure ministerial and clerical errors on their FCC Form 470 or FCC Form 471, and an additional opportunity to file the required certifications. Specifically, USAC shall inform applicants promptly in writing of any and all ministerial or clerical errors that are detected in their applications, along with a clear and specific explanation of how the applicant can remedy those errors. USAC shall also inform applications promptly in writing of any missing or incomplete certifications. Applicants shall have 15 calendar days from the date of receipt of notice in writing by USAC to amend or re-file their FCC Form 470, FCC Form 471 or associated certifications. USAC shall apply this directive to all pending applications and appeals even if such applications or appeals are no longer within the filing window. The 15-day period is limited enough to ensure that funding decisions are not unreasonably delayed

for E-rate applicants and should be sufficient time to correct truly unintentional ministerial and clerical errors. The opportunity for applicants to amend their filings to cure minor errors will also improve the efficiency and effectiveness of the Fund. Because applicants who are eligible for funding will now receive funding where previously it was denied for minor errors, we will ensure that funding is distributed first to the applicants who are determined by our rules to be most in need of funding.”

3. In the Request for Review filed by Glendale Unified School District, File No. SLD-143548 decided on February 1, 2006, the Commission once again held that:

“The Commission may waive any provision of its rules on its own motion and for good cause shown. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.”

4. In the recent order entitled Academia Discipulos de Cristo Bayamon, Puerto Rico, et al., adopted Aug 16, 2006, the FCC stated that:

“Prior to Funding Year 2004, the Commission released only one order addressing an appeal of the requirement that price be a primary factor in selecting the winning bid. Specifically, in the Tennessee Order, released in 1999, the Commission determined that a competitive bidding process complies with program rules if price is taken into account during bid selection and the contract is awarded to the most cost-effective bidder. The Commission further concluded that other factors, such as prior experience, personnel qualifications, and management capability, also may form a reasonable basis on which to evaluate whether an offering is cost-effective.”

“Four years later, after the conclusion of the Funding Year 2003 competitive bidding process, the Commission released the Ysleta Order in which it revised the policies established in the Tennessee Order. In the Ysleta Order, the Commission concluded that price must be the primary factor in selecting a winning bid. This policy differs from the direction given in the Tennessee Order in that schools are now required to have a separate “cost category” when evaluating bids and that category must be given more weight than any other category.”

The Bayamon order also went on to state:

“The Commission’s rules, however, do not expressly establish a bright line test for what is a “cost effective service.” Although the Commission has requested comment on whether it would be beneficial to develop such a test, it has not, to date, enunciated bright line standards for determining when a particular service is priced so high as to be considered excessive or not cost-effective. See Schools and Libraries Universal Support Mechanism, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912 (2003).”

IV. DISCUSSION

1. The District relies on the order in the Bishop Perry case, cited *supra*, that the “Commission may waive any provision of its rules on its own motion and for good cause shown.” (47 C.F.R. §1.3.) Additionally, a “rule may be waived where the particular facts make strict compliance inconsistent with the public interest.” Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

In the case at hand, strict adherence to the rule that the reviewer may not accept any new information on appeal would result in an unfair denial of funding. The District has the information necessary to show the proposed expenditure is justified and can show the funding is cost effective and reasonable. Not allowing them to present this evidence would result in an unwarranted denial of funding.

2. The District also relies on the decision in the Glendale Unified School District appeal as cited above. In Glendale, the FCC held that “The Commission may waive any provision of its rules on its own motion and for good cause shown. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.”

3. In regards to the specific ruling by USAC that the District had failed to show that the proposed expense for internet connection applied for was “not cost effective”, the District relies on the ruling in Academia Discipulos de Cristo Bayamon, Puerto Rico, et al. As indicated above, the questions the SLD addressed to the District concerning the “cost effectiveness” issue were

vague and the District believed they had answered them. As noted in the *Bayamon* decision, there is no “**bright line test**” as to what is cost effective and the District believes, given the unique student population they serve and their individualized curriculum, the services they are proposing are cost effective.

4. However, the real issues were as follows:

A. Did the District obtain competitive bids for the requested service?

The District published their Form 470 on the USAC website as required under the E-Rate rules. The only response for internet access was received was from the Santa Barbara County Education Office (SBCEO). There was no response for circuit costs so the District continued using Verizon tariff rates. The District strictly complied with all E-rate rules.

B. Did the District provide a complete explanation of the services requested in order to show that the expense was cost effective?

The District believed that they adequately answered the question posed by USAC. The District understood that USAC believed the District was applying for the same T-1 lines twice. However, it is evident that there was and is a basic misunderstanding relating to what the District meant by the terms “internet access” and “internet service”. The District applied for circuit costs and internet access costs under the category “internet access” and used two different FRN’s to differentiate the two.

In response to Cost Effectiveness Review Questions, the District explained that the following FRNs to Verizon: (1390867, 1391155, 1391158, 1391162, 1391166,

1391173, 1391177, 1391180, and 1393502) were for internet access. They used the term “internet access” to describe the circuit charges to their ISP. The District considered them internet access since the circuit was for the purpose of providing the site with “Internet Access.”

The District also explained that the following FRNs (1391205, 1391210, 1391232, 1391237, 1391239, 1391240, 1391241, 1391243, 1393502, and 1393507) were for Internet Service. These FRNs were for internet access through their ISP (Santa Barbara COE) and did not include circuit charges. The District referred to these FRNs as “Internet Service”.

C. Did USAC base its decision to deny funding on an issue it did not raise in the initial “Cost Effectiveness Review”, thus creating confusion as to what the real issues were?

The initial Cost Effectiveness review was specific and posed eight questions which the District believed it had answered fully. However, in its letter of denial, USAC raised two additional issues, to wit:

1. “In order to ensure that the applicants are not **requesting discounts for services beyond their reasonable needs**, (emphasis added),USAC denies funding requests for not being cost effective (if) the costs of the products and services in a funding request are significantly higher than the costs generally available in the applicant’s marketplace for the same or similar products or services.”
2. “...it has been determined that funding requests for Juvenile Court and Community Schools for internet access and Internet services have not been

justified as cost effective as required by the Schools and Libraries Support Mechanism's rules and procedures. Based on the documentation provided by Fred Razo during review, it was determined that the internet access **cost per student** ranging between \$208.09 to \$1,013.05 has been found not to be cost effective.”

These statements by USAC beg the questions, **were the real issues USAC’s belief that the District was requesting discounts for services beyond their reasonable needs and that the cost per student of the proposed service was not cost effective?**

D. Had those questions been posed in the initial Cost Effectiveness review, the District would have provided the following information:

Although the District provides educational services for a relatively small group of students, the type of student served requires that the District provide a highly individualized program. In order to provide the best program possible, the District is establishing four new programs which require high speed bandwidth in order to function. These programs are all part of their 2005 to 2010 Technology Plan. Those programs are:

- A. **Aeries** – a student information system which tracks student attendance, grades and student records. The vendor recommends .5 MBs of bandwidth.
- B. **Read 180** - a reading intervention program which requires .2 MB bandwidth per user.
- C. **Cyber High** – allows students with deficiencies in credits to catch up by taking classes on the web. This program requires a T-1 Internet Connection.

D. **MAP (by NWEA)** – assesses student’s readiness level (students of the District typically fall in the “Below Basic” or Far Below Basic” categories). The vendor recommends .3MB of bandwidth per user.

Based on the bandwidth needs of the four programs, it is clear that the District’s need for one T-1 line at its smaller sites or two T-1s at its larger sites is not excessive and is indeed a “reasonable need”. Additionally, the District accepted the only bid it received for the internet access and since no other vendors responded, used tariff rates for circuit costs. As discussed above, the District serves a fairly unique student population. These students typically attend District schools for short periods of time from a few days to two months. Also, the students often enroll, attend classes for a short time, transfer to another school and then return for another short time during the same school year. It is important for the District to be able to customize an educational program for these students and be able to track their progress accurately.

Another unique feature of the District is that the average number of students per computer is 2.5. This fact should be considered when evaluating whether or not the services requested are reasonable since the student to computer ratio is above the norm. Calculating the cost per student using the traditional method of dividing the cost of the service by the number of students is inappropriate in this instance because of the above average computer to student ratio in the District.

The District is proposing to increase their bandwidth for educationally and technically sound reasons. As noted above, the programs the District is proposing to implement require additional bandwidth. The District presently has fractional T-1s at five of their sites and full T-1s at four of their sites. An analysis of bandwidth usage

shows that all sites are hitting 100% usage several times during the day. At this point only one of the four new applications has been fully implemented. Without the proposed bandwidth additions, the District will not be able to implement the other three programs. The existing and proposed additions to their bandwidth clearly fall within any definition of reasonable needs.

VI. CONCLUSION

For the reasons discussed herein, the District respectfully requests the Commission grant the Appeal and Request for Review and instruct USAC to fund the proposal pursuant to the E-rate rules.

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